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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

OPTIMA FUNDING, INC., Plaintiff and Appellant, v. WAYNE STRANG, Defendant and Respondent.	B191875 (Los Angeles County Super. Ct. No. YC052828)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lois A. Smaltz, Judge. Affirmed and remanded with directions.

Pistone & Wolder, LLP, Thomas A. Pistone, and Eric J. Medel for Plaintiff and Appellant.

Kenneth P. Koury for Defendant and Respondent.

Plaintiff and appellant Optima Funding, Inc. (Optima) commenced an action against defendants Jimmy Sutton, Mark Klein and Wayne Strang (Strang) under the Unfair Practices Act (Cal. Bus & Prof. Code, § 17200 et seq.) (Unfair Practices Act) for allegedly manufacturing evidence to bring small claims actions against businesses and individuals such as Optima, under the Federal Telephone Consumer Protection Act (47 U.S.C., § 227 et seq.) (TCPA). The trial court granted defendant Strang's motion to strike the complaint under Code of Civil Procedure section 425.16 (anti-SLAPP statute). We affirm the trial court's determination.

FACTS AND PROCEEDINGS

Optima is a mortgage brokerage company. It advertises, but asserts it has not used and does not allow others on its behalf to use unsolicited facsimile transmissions in connection with its advertising activities. It has used so-called "lead generating companies" to obtain referrals for it. In 2003, Optima began being sued in small claims courts under the TCPA, which provides for a minimum $500 private civil remedy for each violation of prohibited sending of unsolicited facsimile advertisements. (47 U.S.C., § 227(d)(1)(C); (b)(3)(B).) Although suspecting that a lead generating company may have been a source of unsolicited facsimiles, Optima was unable to verify this. Optima claimed in its complaint that defendants are "cooperatively making a business of filing TCPA lawsuits against Optima . . . and others based on false evidence." As a result, Optima filed its action against defendants alleging unfair, unlawful and fraudulent business acts or practices prohibited by Business and Professions Code section 17200, et seq. Optima sought an injunction and restoration of monies.

Defendant Strang brought a special motion to strike under Code of Civil Procedure section 425.16—the anti-SLAPP statute. The trial court granted the motion. The trial court, in the alternative, also sustained a demurrer to the complaint. The trial court concluded that the anti-SLAPP statute applied and that plaintiff has not submitted facts, that if proven at trial, would result in plaintiff prevailing. The trial court said that plaintiff had failed to present facts that Strang had manufactured evidence or provided

false testimony. The trial court also stated that there was no civil action for perjury or suborning perjury. Optima timely appealed. The judgment was entered thereafter. Nevertheless, we may treat the notice of appeal as operative. (Cal. Rules of Court, rule 8.104(e)(2).) Optima filed a separate appeal with respect to the trial court's motion to strike as to the other defendants. Optima's appeal of attorney fees awarded Strang is included in that subsequent appeal. That appeal has not been consolidated with this appeal.

DISCUSSION

"A SLAPP suit — a strategic lawsuit against public participation — seeks to chill or punish a party's exercise of constitutional rights to free speech and to petition the government for redress of grievances. [Citation.] The Legislature enacted Code of Civil Procedure section 425.16 — known as the anti-SLAPP statute — to provide a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights. [Citation.]" (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055-1056.)

To apply the anti-SLAPP statute, courts engage in a two-step process. "'First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. . . . If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim.'" (*Taus v. Loftus* (2007) 40 Cal.4th 683, 712, omission in original, quoting *Equilon Enterprises, LLC v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 (*Equilon*).) "'In order to establish a probability of prevailing on the claim (§ 425.16, subd. (b)(1)), a plaintiff responding to an anti-SLAPP motion must "'state [] and substantiate [] a legally sufficient claim.'" [Citations.] Put another way, the plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." [Citations.] In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant (§ 425.16, subd. (b)(2)); though the court does not

weigh the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim. [Citation.]' ([*Wilson v. Parker, Covert & Chidester* (2002)] 28 Cal.4th [811,] at p. 821, original italics.) (See also, e.g., *Equilon, supra,* 29 Cal.4th 53, 63 [section 425.16 'subjects to potential dismissal . . . those causes of action as to which the plaintiff is unable to show a probability of prevailing on the merits [citation], a provision we have read as "requiring the court to determine only if the plaintiff has stated and substantiated a legally sufficient claim"']; *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192 [25 Cal.Rptr.3d 298, 106 P.3d 958] [under section 425.16 'the trial court evaluates the merits of the lawsuit using a summary-judgment-like procedure at an early state of the litigation'].)" (*Taus v. Loftus, supra,* 40 Cal.4th at pp. 713-714.)

Code of Civil Procedure section 425.16 defines an "act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue," covered by the anti-SLAPP statute and subject to a SLAPP motion, as including statements or writings made before a judicial proceeding or made in connection with an issue under consideration or review by a judicial body. (Code Civ. Proc, § 425.16, subd. (b)(1)(2).). Thus, statements, writings and pleadings in connection with civil litigation are covered by the anti-SLAPP statute, and that statute does not require any showing that the litigated matter concerns a matter of public interest. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115; *Healy v. Tuscany Hills Landscape & Recreation Corp.* (2006) 137 Cal.App.4th 1, 5 (*Healy*).)

"Both section 425.16 and Civil Code section 47 are construed broadly, to protect the right of litigants to '"the utmost freedom of access to the courts without [the] fear of being harassed subsequently by derivative tort actions."' (*Rubin v. Green* (1993) 4 Cal.4th 1187, 1194 [17 Cal.Rptr.2d 828, 847 P.2d 1044]; see § 425.16, subd. (a); *Briggs, supra,* 19 Cal.4th at p. 1119.) Thus, it has been established for well over a century that a communication is absolutely immune from any tort liability if it has '"some relation"' to

judicial proceedings. (*Rubin v. Green, supra,* 4 Cal.4th at p. 1193.)" (*Healy, supra,* 137 Cal.App.4th at p. 5.) Our review of the granting of a motion to strike under the anti-SLAPP statute is de novo. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3; *Flatley v. Mauro* (2006) 39 Cal.4th 299, 325.)

Plaintiff claims that the alleged violations of the Unfair Practices Act renders Strang's acts illegal and therefore not covered by the anti-SLAPP statute. (See *Flatley v. Mauro, supra,* 39 Cal.4th at pp. 317-320.) That act, however, must be conceded by plaintiff or "conclusively demonstrated have been illegal" as a matter of law, to render the anti-SLAPP statute inapplicable. (*Id.* at pp. 319-320.) As we discuss, there is no such showing here.[1]

This action involves the filing by Strang of small claims actions. Thus, the action fulfills the first step of the anti-SLAPP statute. The burden therefore shifts to the plaintiff to show that its claim is "'"both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited."'" (*Jarrow Formulas, Inc. v. La Marche* (2003) 31 Cal.4th 728, 741.)

In connection with the second step of the anti-SLAPP statute—probability that plaintiff will prevail—Strang stated in a sworn declaration that he filed five TCPA cases against plaintiff base on unsolicited faxed advertisements received at his home that were sent on Optima's behalf; he prevailed in the first and second cases and lost the others; there was never any evidence that he had falsified any evidence or done any of the wrongful acts alleged; and Optima's defense was that its agency failed to stop sending faxes when Optima told the agency to cease doing so. Strang also argued that there is no

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[1] Optima refers to Civil Code section 47, subdivision (b)(2) that exempts from privileged publications "any communication made in furtherance of an act of intentional destruction or alteration of physical evidence undertaken for the purpose of depriving a party to litigation of the use of that evidence . . . ." Even if this section was relevant to the anti-SLAPP statute in this case, Optima has not alleged "any destruction or alteration of physical evidence."

civil remedy related to the presentation of false evidence. (See *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 10 [approving cases "denying a tort remedy for the presentation of false evidence or the suppression of evidence"].)

Optima countered with evidence that Strang had brought numerous TCPA actions against a number of companies; the other co-defendants had brought numerous TCPA actions against Optima and others; Strang and others operated together to bring these actions; that Optima was not responsible for unsolicited facsimile advertisements; and that after Optima severed its relationship with the lead generating companies, it was impossible that any of the defendants could have received an unsolicited facsimile advertisement from or on behalf of Optima, but the TCPA actions against it continued. Optima requested limited discovery to show communication among the defendants and to show that the alleged facsimiles were never received.

As noted, after the defendant makes the showing that the cause of action arises from an act in furtherance of the right of petition, as is the case here, the plaintiff has the burden of demonstrating the probability of prevailing, but the plaintiff need only establish the challenged cause of action has "minimal merit." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88, 94.) The action is under the Unfair Practices Act. The anti-SLAPP statute can apply to such an action—it is not limited to tort actions. (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 652 ["the Legislature did not limit application of the provision to such actions [tort], recognizing that all kinds of claims could achieve the objective of a SLAPP suit—to interfere with and burden the defendant's exercise of his or her rights"], disapproved on other grounds in *Equilon, supra,* 29 Cal.4th at pp. 61, 68, fn. 5; *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 915 [SLAPP motion as to Unfair Practices Act claims arising from defendant's litigation activities].)

Plaintiff has not submitted any evidence that Strang filed the cases with knowingly false evidence or that Strang conspired with any one or that Strang committed any illegal act. Optima claims an inference can be drawn to establish its claims from the filing of lawsuits after it and its lead-generating companies were no longer sending unsolicited

facsimile advertisements. But there is no evidence that the actions did not relate to facsimiles sent prior to the date that they allegedly no longer could have been sent. Optima points to the large number of cases filed by Strang and others under the TCPA and submits a declaration stating that the defendant and others who filed actions are working together. But there is still insufficient evidence that Strang is involved in creating false and perjurious evidence. Optima's allegations in its complaint are based on information and belief, and it acknowledges, in effect, that it may need discovery to obtain such evidence. There is no showing of a violation of the Unfair Practices Act. Moreover, the Unfair Practices Act claim is based on litigation commenced by Strang. Those actions are privileged under Civil Code section 47, subdivision (b). "[C]ommunications made in connection with litigation do not necessarily fall outside the privilege simply because they are, or are alleged to be, fraudulent, perjurious, unethical, or even illegal. . . . The communications in this case were not only related to the litigation, they *were* the litigation, or more accurately the pleadings in the litigation." (*Kashian v. Harriman, supra,* 98 Cal.App.4th at p. 920.) The privilege covers virtually all causes of action concerning statements made in litigation (except malicious prosecution),[2] including fraud actions (see *Carden v. Getzoff* (1987) 190 Cal.App.3d 907, 913).

Optima did, in its opposition papers, request discovery, which under the anti-SLAPP statute it may obtain based on a noticed motion and for good cause. (Code Civ. Proc., § 425.16, subd. (g).) No such motion was made, and, as the plaintiff acknowledges, the court never ruled on any request for discovery. The noticed motion has been considered a prerequisite for any discovery. (*Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1248;

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[2] Malicious prosecution is the only tort action not barred by Civil Code section 47. (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212, 216; *O'Keefe v. Kompa* (2000) 84 Cal.App.4th 130, 134, Fn. 5; *Flores v. Emerich & Fike* (E.D. Cal. 2006) 416 F.Supp.2d 885, 899.)

Britts v. Superior Court (2006) 145 Cal.App.4th 1112, 1129.) Optima only mentions that it requested discovery. It does specifically state that the failure to grant discovery is a ground for reversal of the judgment. Moreover, there is no indication of how discovery would overcome the privilege afforded by Civil Code section 47, subdivision (b). Accordingly, we conclude that the trial court properly granted the motion to strike.[3]

DISPOSITION

We affirm the judgment of the trial court. Defendant Strang is awarded his costs of appeal. The matter is remanded to the trial court in connection with attorney fees on appeal.

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MOSK, J.

We concur:

ARMSTRONG, Acting P. J.

KRIEGLER, J.

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[3] Although not specifically requesting attorney fees on appeal, Strang moved for attorney fees before the trial court and asked that this matter be affirmed but "remanded to the Court below for further proceedings." We construe that request to be one for attorney fees on appeal. (*Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1499-1500 ["A statute authorizing an attorney fee award at the trial court level includes appellate attorney fees unless the statute specifically provides otherwise"].)